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No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1984

THOMAS FRED WARD,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether an Indictment charging in a single Count seven disparate and unconnected transactions as a single violation of Title 26 U.S.C. §7206(4) is duplicitous and in direct conflict with the requirements of Federal Rule of Criminal Procedure 8(a) and further whether prosecution under such a Count denies a Defendant his Constitutional Right to Trial by jury and due process as well as effective assistance of counsel.

2. Whether the foundational basis (the agreement) necessary to sustain a prosecution and conviction under Title 18 U.S.C. §371 is destroyed when the Defendant's only alleged co-conspirator testified that she did not agree with the Defendant to conceal assets or property from the IRS and had no intent to do so.

3. Whether, where the alleged co-conspirator testified as a government witness under grant of immunity about the lack of an agreement to violate the law and the Prosecution made no effort to impeach or contradict such testimony, the Prosecution is bound thereby thus requiring the dismissal or judgment of acquittal on the conspiracy count as a matter of law.

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THOMAS FRED WARD,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner, Thomas Fred Ward, requests the Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on November 14, 1984.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit appears in Appendix A to this Petition. No opinion was rendered by the trial court.

JURISDICTION

The Petitoiner is seeking a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit in order to review a judgment entered on November 14, 1984

affirming a Judgment and Sentence of Conviction entered by the United States District Court for the Western District of Oklahoma on August 25, 1983. A timely Petition for Rehearing and Suggestion for Hearing En Banc was denied by the United States Court of Appeals for the Tenth Circuit on January 31, 1985. Jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

1. Title 26 U.S.C. §7206 provides, in pertinent portion:

"Any person who . . . removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or *any property* upon which levy is authorized by §6331, with intent to evade or defeat the assessment or collection of any tax imposed by this Title; . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution." (Emphasis supplied)

2. Title 18 U.S.C. §371 provides, in pertinent portion:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than 5 years, or both."

STATEMENT OF THE CASE

A. Procedural Background of the Case

The Petitioner herein, was indicted April 8, 1983 by a Federal Grand Jury in the Western District of Oklahoma in a Two-Count Indictment. The Petitioner was charged under Count I with concealing property intending to evade and defeat the collection of wagering excise taxes assessed against him with such concealment allegedly occurring on seven different dates from February 3, 1975 to April 17, 1980 in violation of Title 26 U.S.C. §7206(4). Six of the seven charged items involved alleged interests in real property and the seventh involved stock ownership in the Soundstage Disco Club. The Petitioner filed a Motion under Rule 8(a) of the Federal Rules of Criminal Procedure to require the Government to elect which of the seven described transactions was the unit of prosecution or in the alternative to dismiss. This Motion was overruled by the trial court.

The Petitioner was charged in Count II under Title 18 U.S.C. §371 with conspiracy to carry out the concealment of the property interests with the named co-conspirator, one Peggy McDaniel, who testified at trial as an immunized witness for the Government.

The jury returned a verdict of guilty in both Count I and Count II. Thereafter, the Honorable Ralph G. Thompson, United States District Judge, sentenced the Petitioner to concurrent 15-month terms on Count I and Count II under the provisions of 18 U.S.C. §4205(b)(2) and further sentenced the Defendant on Count II to pay a $10,000 committed fine.

Petitioner perfected an Appeal to the United States Court of Appeals for the Tenth Circuit. There the Petitioner argued that the joinder of seven disparate and separate items of charged concealment of "property" was duplicitous and in violation of Rule 8(a) of the Federal Rules of Criminal Procedure and further in relation to Count II (conspiracy) that where the alleged co-conspirator testified affirmatively that *she did not agree to hide or conceal* any *property* or interests therein from the Internal Revenue Service and had no intent in any way to violate the law, and this testimony was allowed to stand uncontradicted and unimpeached, that the fundamental element of agreement necessary to support a conspiracy conviction under §371 was missing.

The United States Court of Appeals for the Tenth Circuit affirmed Petitioner's conviction. A copy of the Opinion and Judgment of the United States Court of Appeals for the Tenth Circuit is attached hereto as Appendix A.

The Petitioner timely petitioned the United States Court of Appeals for the Tenth Circuit for a Rehearing in his case. A copy of Petitioner's Petition for Rehearing and Suggestion for Hearing En Banc in the United States Court of Appeals for the Tenth Circuit with supporting Memorandum is attached hereto as Appendix B. The United States Court of Appeals for the Tenth Circuit denied the Petitioner's Petition for Rehearing and Suggestion for Hearing En Banc and a copy of said denial is attached hereto as Appendix C.

B. Relevant Facts Material to a Consideration of Questions Presented

The seven items allegedly concealed by the Petitioner in Count I, involved transactions stretching from February 3, 1975 to April 17, 1980. These involved alleged interests in rural farm property, City lots in Lawton, Oklahoma, an unrecorded deed to City lots in Elgin, Oklahoma and stock ownership in the Soundstage Disco Club. All of these items or transactions required different witnesses and different evidence in their proof. Not one of the transactions were related to the other, in that they involved different properties, were accomplished at different times and involved different persons and ownership interests. The Petitioner, never at any time, denied his equitable interests. Petitioner never at any point in time received any rent income from the properties, nor were the properties ever sold under the profit-sharing arrangement with government witness McDaniel. The trial court in overruling Petitioner's Motion to Dismiss or in the Alternative to Require Election, stated that the crime was complete upon the "concealment" of the property. This being so, prosecution for six of the seven alleged items should have been barred by the applicable three-year statute of limitations. The trial court, as well as the Tenth Circuit Court of Appeals, improperly construed §7206(4) of Title 26 as being susceptible of a "continuous" violation.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Tenth Circuit in affirming the trial court, has placed its approval upon a violation of the requirements of Rule 8(a) in Count I of the Indictment in requiring the Petitioner to go to trial on a "porcupine count" which alleged seven separate dissimilar and disparate items of concealment as violating Title 26 U.S.C. §7206(4) and approving the failure to require proof of an agreement necessary to support a conspiracy charge as a prerequisite to conviction under §371 of Title 18 in Count II. In both respects, the Tenth Circuit Court of Appeals has ignored its own prior precedent and has thereby placed the Tenth Circuit in direct conflict with holdings of the Second, Third, Fifth and Seventh Circuits, as well as this Court's applicable decisions.

I. THE RULINGS OF THE TRIAL COURT AS AFFIRMED BY THE COURT OF APPEALS THAT COUNT I OF THE INDICTMENT LISTING SEVEN SEPARATE ITEMS OF PROPERTY ALLEGEDLY CONCEALED AS A SINGLE VIOLATION OF TITLE 26 U.S.C. §7206(4) IN TRANSACTIONS STRETCHING IN EXCESS OF A FIVE-YEAR PERIOD WAS NOT DUPLICITOUS IS IN DIRECT CONFLICT WITH RULE 8(a) OF FEDERAL RULES OF CRIMINAL PROCEDURE AND THE APPLICABLE DECISIONS OF THIS COURT AS WELL AS OTHER CIRCUIT COURT DECISIONS.

The trial court determined that the seven separate and dissimilar items charged and lumped together in Count I were all parts of "a single transaction". The trial court held in its ruling that the gist of the statute made it unlawful to conceal property with the intent of evading tax

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liability and that the crime was "complete upon the concealment" and was not contingent upon the quantity of property concealed. However, the court further reasoned that since there was only one assessment for wagering excise taxes that there could be only one violation of the statute.

Blockburger v. *U.S.*, 284 U.S. 299, held that the general test for determining whether several offenses may be involved in a charge is whether identical evidence will support each of them, and if any dissimilar facts must be proved, then there is more than one offense. Not only did Petitioner contend, pre-trial, but the trial itself disclosed that different evidence was necessary to prove each of the alleged occurrences of concealment. These were not allegations in the conjunctive of simply different ways in which a given statute could be violated (possession with intent, sale, etc.), but were separate items of concealment.

Rule 8(a) sets up and requires a one-offense one-Count standard and prohibits the charging of more than one offense in a single Count. This is simply because such a duplicitous Count fails to inform a Defendant whether he will be confronted at trial with evidence of all or only some of the "offenses" charged and, if the latter, which he has to meet. This likewise puts a defendant at risk that a less than unanimous jury verdict may result. This duplicity has been condemned in numerous cases of the various Circuits. (*U.S.* v. *Tanner*, 471 F.2d 128 (7th Cir. 1972), *cert. den.* 409 U.S. 949; *U.S.* v. *Murray*, 618 F.2d 892 (2d Cir. 1980); *U.S.* v. *Browning*, 572 F.2d 72 (10th Cir. 1978), *cert. den.* 439 U.S. 822; *United States* v. *Starks*, 515 F.2d 112 (3rd Cir. 1975), *aff'd* 431 U.S. 651; *Bins* v. *U.S.*, 331 F.2d 390 (5th Cir. 1964)—citing *Blockburger* v. *U.S.*, *supra.*)

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The Tenth Circuit relied as authority for affirming the improper ruling of the trial court on its previous ruling in *United States* v. *Browning, supra.* This reliance is ill-placed since the Browning Opinion itself, in reversing a dismissal of an Indictment, stated that the trial court upon remand should require election as the evidence may dictate. In the case at bar, the dissimilar facts concerning both real and personal properties, different individuals involved and various equitable interests as opposed to legal title, allegedly some owned without any awareness thereof on the part of the Petitioner, were all contained in this one "porcupine Count". An example of this condemned duplicity is to be found in *United States* v. *Tanner, supra,* decided by the Seventh Circuit with certiorari being denied by this Court, wherein the Indictment charged the Defendants with transportation of explosives in interstate commerce between Tennessee and diverse other places over a four-month period. This involved *different trips* carrying *different carloads* of dynamite and the court condemned this as not being part of a single continuing scheme. In the case at bar, the trial court cited *Bell* v. *U.S.*, 349 U.S. 81 (1955) in support of its holding, but an examination of Mr. Justice Frankfurter's Opinion in *Bell* is supportive of this Petitioner's position. That is that any ambiguity in determining what Congress has stated to be the "unit of prosecution" should be resolved in favor of leniety (349 U.S. at 83). In the case at bar, not only was Petitioner denied his right to assert the defense of the applicable statute of limitations to six of the seven charged items, but he likewise was required to submit to what in all probability was less than a unanimous jury verdict.

The affirmance by the Tenth Circuit Court of Appeals of the trial court's rulings now places the Tenth Circuit at odds with its own prior decisional precedent and at odds with the cited Circuit Opinions above.

Simply — logical construction and reading of the applicable statute (§7206(4)) militates against the strained construction applied by the trial court. It is inconceivable to hold that Congress intended that only one crime of concealment could be committed if only one assessment was in existence. Congress could quite simply have answered this by stating that any such concealed *property* was to include *properties*. Congress did not see fit to do so and therefore the "unit of prosecution" should be each alleged act of concealment. This, on its face, requires that each separate alleged crime be charged in a separate Count.

If Petitioner were guilty of any crime at all, it was for each separately stated item or transaction in Count I. None of these items or interests were dependent upon the existence of any of the other charged transactions. For example, Item One, if improper or illegal concealment had occurred, was a completed transaction on the date specified in the Indictment and the same is true of all successive items. There is no nexus of activity connecting any one item of property or transaction to any other item. The principle of statutory construction that Petitioner contends controls this question has been treated by this Court many times on the "flip-side" of the question, and that is, in determining that separate offenses under one statute have been committed rather than one series or one offense continuous in character. (*Blockburger* v. *United States, supra; Ebeling* v. *Morgan,* 237 U.S. 625.)

Proper statutory construction of §7206(4) would clearly mandate that *Congress intended each separate concealment of property with the requisite intent to be a violation of the law.* A trial court's ruling to correct, without stating so, the ineptitude of the prosecution in drafting an Indictment to include more than one crime in one Count, makes a mockery of the requirements of Rule 8(a) FRCP and, in the case at bar, has effectively denied Petitioner a fair trial.

II. THE HOLDING OF THE TENTH CIRCUIT COURT OF APPEALS THAT IN SPITE OF THE UNCONTRADICTED AND UNIMPEACHED TESTIMONY OF PETITIONER'S ALLEGED CO-CONSPIRATOR TESTIFYING AS AN IMMUNIZED GOVERNMENT WITNESS THAT SHE DID NOT AGREE TO CONCEAL ANYTHING FROM THE INTERNAL REVENUE SERVICE AND POSSESSED NO INTENT TO VIOLATE THE LAW WAS NONETHELESS SUFFICIENT TO SHOW THE AGREEMENT NECESSARY TO SUPPORT THE CHARGE AND CONVICTION OF CONSPIRACY UNDER §371 IS IN DIRECT CONFLICT WITH PRIOR DECISIONS OF THE TENTH CIRCUIT, SPECIFICALLY IN CONFLICT WITH THE COURT OF APPEALS FOR THE THIRD CIRCUIT AS WELL AS APPLICABLE DECISIONS OF THIS COURT RELATIVE TO THE ELEMENTS NECESSARY TO SUSTAIN A CONSPIRACY CONVICTION.

The only alleged co-conspirator with Petitioner under Count II of the Indictment was Peggy McDaniel who testified as a government witness under grant of immunity. The following questions and answers are pertinent:

"Q. Did you ever agree with Tom Ward to hide anything from the Internal Revenue Service?

A. No sir.

* * *

Q. Did you ever keep secret from anyone the fact that Tom Ward had an interest in properties that you were renting and holding for speculation that were in your name, that he put up the money for?

A. I've never concealed his interest to anyone.

* * *

Q. Did he ever ask you to hide anything from the I.R.S.?

A. He never asked me specifically to hide anything."

In addition, this Government witness recalled on cross-examination certain Grand Jury testimony she had given that she had been told by an I.R.S. man about the tax lien against Petitioner at a time when she was cooperating with the I.R.S. It was her testimony that this revelation from the I.R.S. agent was her first knowledge of any tax assessment against Tom Ward. Although permitted under the Rules of Evidence to impeach its own witness, no effort was made by the Prosecution to impeach this testimony nor were in fact any questions asked concerning it (TT 164-195).

In prosecutions under Title 18 U.S.C. §371, it has long been recognized that the gist of the crime is the *agreement* between alleged co-conspirators. Without an agreement between the Defendant and at least one other person, a violation of §371 as charged in this case cannot exist. (*Braverman* v. *U.S.*, 317 U.S. 49, 53.) This Court has consistently held that it is fundamental that a conviction for conspiracy under 18 U.S.C. §371 cannot be sustained unless there is "proof of an agreement to commit an offense against the United States." (*Ingram* v. *United States*, 360 U.S. 672, 677-678.)

The Third Circuit in *U.S.* v. *Vasquez*, 319 F.2d 381 (3rd Cir. 1963), held that where the Government witness, an alleged co-conspirator, gave affirmative testimony as to the lack of intent to violate the law and the absence of any agreement to violate the law and defraud the Government, that the Prosecution, where no effort to impeach or contradict such testimony was made, was bound thereby and that as a matter of law no conspiracy could exist. This case, although cited and followed by other Circuits, as precedential authority in conspiracy cases *was not mentioned or distinguished* by either the trial court or the Tenth Circuit Court of Appeals although the facts and law of the *Vasquez* case were presented to both courts and argued extensively.

The gist of the crime as charged in the Indictment was a conspiracy to conceal assets and property from the Internal Revenue Service in violation of §7206(4). Not only did the only alleged co-conspirator affirmatively deny the existence of any such agreement but she also testified, again without contradiction, that she was not aware of the existence of any wagering tax assessment against Petitioner until after the fact investigation and her cooperation with the Internal Revenue Service was underway. The alleged co-conspirator and Government witness further testified that the property arrangements she had with Petitioner relative to a split of profits in the event the properties were ever disposed of, was similar to many arrangements she had with other persons in her business as real estate broker in Lawton, Oklahoma. Her unimpeached and uncontradicted testimony that she did not agree to conceal any assets nor in concert with the Defendant intend to hide anything from anyone, destroys the foundational basis nec-

essary to sustain a conviction of conspiracy under §371 as charged in Count II of the Indictment. As a matter of law, this Count should have been dismissed by the trial court and judgment of acquittal entered for the Petitioner as requested.

A long line of cases, even in the Tenth Circuit Court of Appeals, holds that an agreement to violate the law and intent to violate the law, is a necessary element for conviction under §371. The ruling of the Tenth Circuit Court of Appeals, in the case at bar, is in direct conflict with these cases as well as applicable decisions of this Court. The Tenth Circuit and trial court specifically ignored and failed to distinguish in any respect the holding in *U.S.* v. *Vasquez, supra.*

CONCLUSION

The holding of the United States Court of Appeals for the Tenth Circuit that Count I of the Indictment below was not duplicitous and that the uncontradicted and unimpeached testimony of the alleged co-conspirator as a Government witness, that she did not agree with Petitioner to conceal assets from the Internal Revenue Service and thereby violate §7206(4) was not sufficient to show the absence of an agreement and the necessary intent required for conviction under §371 of Title 18 is erroneous.

The charging in one Count of seven separate and disparate alleged concealments of property interests stretching over a five-year period, all requiring different evidence, as a single violation of §7206(4) is a direct violation of Rule 8(a) FRCP which denied Petitioner due process and a fair tiral.

The Prosecution was bound by the unimpeached and uncontradicted testimony of its own witness, the only alleged co-conspirator, that she did not agree to violate the law and conceal property from the I.R.S. in concert with Petitioner, and this destroyed the foundational basis necessary to sustain a conviction of conspiracy under §371.

In so holding, the Tenth Circuit Court of Appeals now stands alone and unique among all other Circuits and is as well at odds with the prior applicable decisions of this Court. For these reasons it is respectfully requested that the Writ of Certiorari herein sought should be granted and the Petitioner be afforded appropriate relief by this Court.

Respectfully submitted,

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March, 1985

APPENDICES

APPENDIX A

[Filed Nov. 14, 1984]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	(W.D. Okla.)
v.	)	No. 83-2089
	)	(D.C. Criminal
THOMAS FRED WARD, Defendant-Appellant.	)	No. 83-64-T)

ORDER AND JUDGMENT

Before SETH, BARRETT and SEYMOUR, Circuit Judges.

The defendant-appellant was charged in a two count indictment. Count I alleged a single offense under 26 U.S.C. § 7206(4) describing seven pieces of real estate in which defendant concealed an interest. This was charged as an act to evade and defeat the collection of excise taxes assessed in 1974 against the defendant, and to knowingly conceal money and the property interests therein described. The indictment asserts that a levy was authorized on the property.

Count II charged under 18 U.S.C. § 371 a conspiracy to carry out the concealment of money and property. The co-conspirator was a person who purchased the property with defendant's funds and who took title thereto in her name. She testified at trial as a witness for the Government.

The Government established at trial that there was an assessment for wagering excise taxes against the defendant for $331,402.43, and that a levy was authorized on the property listed. The witnesses who testified as to the acts and statements of the defendant relative to the property estab-

lished his intent to conceal the property to evade or defeat an assessment of the taxes.

As mentioned, there were seven purchases of property listed in the indictment. This was charged as a single offense of concealment. The defendant urges on this appeal that there should have been a separate count for each real estate transaction under Rule 8 of the Federal Rules of Criminal Procedure. We conclude, however, that there was a concealment by the transactions. The offense is this "concealment," and the Government could charge that the "concealment" was accomplished by the totality of the described transactions. We considered a similar issue in United States v. Browning, Inc., 572 F.2d 720 (10th Cir.), where there were a series of importations under separate documentation. We there said:

> "Merely because an indictment alleges several means of accomplishing a single offense, rather than two separate offenses, in a single count, does not necessarily mean that it is duplicitous."

We there cited Travis v. United States, 247 F.2d 130 (10th Cir.). In Frankfort Distilleries v. United States, 144 F.2d 824 (10th Cir.), the issue was also presented and we said of the basic consideration:

> "Duplicity in an indictment means the charging of two or more separate and distinct offenses in one count, not the charging of a single offense into which several related acts enter as ways and means of accomplishing the purpose."

Again, we hold that the several transactions were the means by which the "concealment" was accomplished.

The defendant also urges that the Government's proof failed to establish under Count II (the conspiracy count) an "agreement" between the defendant and coconspirator to commit an offense. The coconspirator testified that she

did not agree to hide anything from the IRS and never meant to "hide anything." Her testimony showed, however, that she knew the defendant was having problems with the IRS, that it was seeking to collect from him, and that he could not have a bank account for that reason. She also testified that defendant would have the property he purchased put in her name and told her: "You know I can't have anything in my name." There was other evidence of an agreement between the two that defendant's property acquisitions would be placed in her name for the reason indicated above and when sold they would share the proceeds.

The agreement between the two to prevent the record title from showing the interest of defendant in the real estate was sufficient to establish a conspiracy to conceal defendant's interest therein and so evade the collection of taxes. It was a cooperative undertaking by the two with a defined purpose and with a number of overt acts. There was a meeting of the minds on the purpose and objective of the agreement. United States v. Crocker, 510 F.2d 1129 (10th Cir.). We held in United States v. Downen, 496 F.2d 314 (10th Cir.), quoting Jones v. United States, 365 F.2d 87 (10th Cir.), that mere knowledge, approval or acquiesence in the object of the conspiracy, without an agreement to cooperate in the end by one of the actors, does not make such a person a party to the conspiracy. As mentioned, the evidence shows that the coconspirator agreed to cooperate to achieve the concealment of interests of defendant to evade the collection of taxes.

There is a three year statute of limitations for violations of 26 U.S.C. § 7206(4) (26 U.S.C. § 6531). The limitation period for the conspiracy as here charged is six years (26 U.S.C. § 6531(8)). Considering the evidence in the light favorable to the Government and considering the argument of the parties, we conclude that the last act for the purpose of both statutes took place on April 17, 1980. The indictment was returned within three years from that date. The defendant urges that the last act charged—the purchase on

April 17, 1980—was not proven. However, the coconspirator testified as to this transaction and her testimony establishes that it was purchased with funds of defendant or with funds in which he had a substantial interest.

We have considered the other issues raised by the defendant and conclude that they are without merit.

AFFIRMED.

(s) *Howard K. Phillips,* Clerk

APPENDIX B

[Filed Nov. 29, 1984]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

THOMAS FRED WARD, Appellant	:	
vs.	:	No. 83-2089
UNITED STATES OF AMERICA Appellee	:	

PETITION FOR REHEARING AND SUGGESTION FOR HEARING EN BANC

COMES NOW Defendant/Appellant, Thomas Fred Ward, and petitions this Honorable Court for a rehearing of the Court's Order and Judgment filed herein on November 14, 1984 and requests and suggests a hearing thereon *en banc* and in support hereof states the following:

1. That the Order and Judgment entered by Judges Seth, Barrett and Seymour as it relates to and treats Appellant's argument as to Count I being duplicitous in nature has overlooked, misapprehended and misread the record relative thereto and has in fact misapplied previous decisions of this Court, specifically *United States* v. *Browning, Inc.*, 572 F.2d 720 (10th Cir.).

2. In *Browning, supra*, this Court in reversing Judge Ritter's dismissal, held that a series of importations pursuant to one single "scheme", which scheme was entered into in 1965, constituted a violation of the customs laws. In the case at bar, Appellant in one count was charged with the crime of concealment in seven separate transactions, six of which involve alleged real estate transactions with four separate and disparate persons and one of which charged concealment of stock interests in a corporation. In *Browning*, this Court reversed a dismissal of the Indictment and

its opinion required the trial court on remand to consider the remedy of election. In the case at bar, the failure of the trial court previously approved by this Court in *Browning*, to require such an election denied the Appellant due process of law.

3. That this Court's Order and Judgment relative to the Conspiracy Count is in direct contradiction to prior rulings of this Circuit and all other Circuit Courts as well as precedential rulings of the United States Supreme Court in that the Court's Order, in effect, rules that a conspiracy existed without proof of the element of *agreement between alleged co-conspirators* and in the face of affirmative direct and uncontradicted testimony of the Government's witness (the alleged co-conspirator) that no such agreement to conceal assets from the Internal Revenue Service existed.

4. That the Court's Order and Judgment herein completely ignored the uncontradicted fact that the alleged co-conspirator, Government witness Peggy McDaniel, did not possess the requisite intent to violate the law which is the foundational basis for any conspiracy conviction.

5. That this Court's Order and Judgment taken in the light most favorable to the prosecution, has confused and misapplied the law of aider and abetting vis-a-vis the law as it relates to the charge of conspiracy in that *absent an agreement* to conceal assets from the Internal Revenue Service no charge or conviction for conspiracy relative thereto can be sustained.

6. That the Order and Judgment of this Court finding that a conspiracy existed when the direct affirmative unimpeached testimony of the alleged co-conspirator showed at a minimum the absence of the *requisite intent* of the conspirators results in this Court now being unique in a redefinition of the law as it applies to conspiracy insofar as this Circuit's previous holdings and the holdings of all other Circuit Courts and the United States Supreme Court are concerned.

That the "redefinition" of the requirements of proof necessary to support a conviction for conspiracy is of sufficient importance in relation to the necessity for uniformity of rulings that this Court should grant Appellant's suggestion for a hearing *en banc* and order such a hearing with oral argument to prevent a miscarriage of justice.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF DEFENDANT/ APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR HEARING EN BANC

The Order and Judgment entered in this Court on the 14th day of November, 1984 by Judges Seth, Barrett and Seymour is quite apparently based upon a misreading of the trial record and improper reliance upon prior case authority in this Circuit and a misapplication of the requirements and elements of the proof of conspiracy as established by the holdings of all other Circuit Courts and the United States Supreme Court. The Defendant/Appellant respectfully points out to the Court the following in support of his Petition for Rehearing and Suggestion for Hearing En Banc:

In relation to the Defendant/Appellant's objection to Count I as being Duplicitous in violation of Rule 8 of the Federal Rules of Criminal Procedure, the Panel in this Court relied as authority on *United States* v. *Browning, Inc.*, 572

F.2d 720 (10th Cir.), but this reliance was ill founded and the Court's ruling in the case at bar is not in comformity therewith. In *Browning*, there was one single scheme originally entered into in 1965 to undertake the importation of rifles through the use of false and fraudulent invoices. (*U.S.* v. *Browning, Inc., supra* at 721, 726-727). A listing of several invoices was contained in the Indictment. This Court was concerned with the extreme sanction of dismissal applied by the trial court and upon remand quite explicitly directed the trial court to consider and require election. Such a procedure was originally sought by the Defendant/Appellant below. The posture of the Tenth Circuit in *Browning* is indicated by the following language appearing at 726 of the opinion:

> "Conceivably, however, the trial court would wish to compel the government to elect as to one transaction and prove the others as similar offenses or perhaps some other procedure would be appropriate once the evidence is in. We are unable, however, to understand the necessity for dismissal of the Indictment on this account."
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> * * *
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> "Secondly, whether this is duplicitous should be considered by the trial court in the light of the evidence. If the Court so determines, it can require the prosecution to make an election as to the single transaction which he wishes to rely on. The remaining items can then be considered as similar offenses to prove the element of the offense or be stricken if not considered relevant. If it is established by the evidence that the twenty six invoices evidence one connected series of transactions, the matter can be so considered."

It is obvious that the charge in *Browning* of criminal culpability on the part of the Defendants arose from the scheme entered into in 1965. The successive invoices obviously were transactions entered into pursuant to this

scheme. Even in light of this, this court in *Browning* ruled that election should be seriously considered by the trial court on remand.

In the case at bar, of the seven items listed in Count I ("the transactions") Items 1 and 2, allegedly occurred in February of 1975 and involved rural farm property, the title to which was never in Defendant/Appellant. There was a complete absence of evidence to connect the alleged co-conspirator (Peggy McDaniel—Count II) with this property and in fact the uncontradicted testimony was that Defendant/Appellant did not even meet Peggy McDaniel until some years subsequent to 1975. Item 3 in Count I was in relation to lots in the City of Elgin to which Defendant/Appellant allegedly received a deed but failed to record such a deed. Items 4 and 5 treated lots in the City of Lawton which Defendant/Appellant was accused of concealing from the I.R.S. and about which alleged co-conspirator, Peggy McDaniel, testified was an ordinary business transaction similar to that engaged with other persons at other times where she held the property under an agreement to split the profits in the event the property was ever sold. She further testified, as the Court is aware, that *she did not agree* to conceal Defendant's interest in this property from the Internal Revenue Service and this testimony stood unimpeached and uncontradicted. In relation to Item 6 — again a lot in the City of Lawton — the alleged co-conspirator Peggy McDaniel testified without contradiction that she purchased an $800.00 equity in this property *without even advising the Defendant* of such a purchase. Item 7 in Count I, as the evidence developed, involved Government's allegations concerning Defendant's unconcealed ownership of corporate stock in a Disco Club in Lawton, Oklahoma and concerning which no one connected with the other 6 transactions had any knowledge or participation. Obviously, all of the alleged 7 transactions involved disparate acts, different persons, different properties and were not even arguably pursuant to a single scheme as was the case in *Browning*.

The prohibition against duplicity in an Indictment was treated by the Supreme Court in *Blockburger* v. *U.S.*, 284 U.S. 299 and a citation of this case by the Fifth Circuit in *Binns* v. *U.S.*, 331 F.2d 390 at 393, is explicit in demonstrating that the Order and Judgment of this Court herein, in relation to the duplicitous nature in Count I of the Indictment should be reversed. This language is:

> "The test for determining whether several offenses are involved is whether identical evidence will support each of them, and if any dissimilar facts must be proved, there is more than one offense."

It is obvious that dissimilar facts, properties, persons, real property vis-a-vis personal property, equitable interests as opposed to legal title, interests allegedly owned without any awareness thereof on the part of the Defendant are contained in this one "porcupine Count". An example of this, condemned duplicity, is to be found in *United States* v. *Tanner*, 471 F.2d 128, decided by the Seventh Circuit with certiorari being denied at 409 U.S. 949, where the Indictment charged the Defendants with transportation of explosives in Interstate Commerce between Tennessee and diverse other places over a four month period. This involved different trips, carrying different carloads of dynamite and the Court condemned this as being not part of a single continuing scheme. In the case at bar, the Defendant was charged with, as stated, seven different disparate transactions involving different properties, different alleged ownership interests therein, failure to record a deed to certain other properties and alleged concealment of the ownership of corporate stock. Clearly, even under the admonitions of this Court in the *Browning* opinion, *supra*, election should have been required. The evil necessarily involved in requiring a Defendant to go to trial where such a "porcupine" count exists, is that the jury may vote for a general verdict of guilty on the basis of different views or different conceptions of the different transactions alleged and lumped together in one Count. This not only denies the Defendant

a fair trial as mandated by our Constitution and as implemented by Rule 8(a) of the Federal Rules of Criminal Procedure, but likewise makes effective assistance of counsel impossible.

Count II of the Indictment charged the Defendant with conspiracy to conceal property and assets from the Internal Revenue Service. The conspiracy was charged to have been entered into with Peggy McDaniel who testified as a Government witness. Peggy McDaniel affirmatively testified that *she did not agree* with the Defendant to conceal assets from the Internal Revenue Service. This testimony as permitted to stand unimpeached and uncontradicted by the Government who did not even cross-examine their own witness concerning this. This Circuit in *U.S.* v. *Downen,* 496 F.2d 314, Cert. Den. 419 U.S. 897, clearly held that each conspirator "*must have the criminal intent necessary to meet the requirements set forth in the substantive offense.*" Likewise, this Court has held in *U.S.* v. *Crocker,* 510 F.2d 1129 and *U.S.* v. *Butler,* 494 F.2d 1246, that there must be a meeting of the minds in the common design, purpose or objects of the conspiracy and without such an agreement to conceal assets from the Internal Revenue Service no such conspiracy could exist as a matter of law. The effect of the Panel's ruling in the case at bar when considered against the unimpeached, uncontradicted, affirmative testimony as a Government witness of the alleged co-conspirator is to eliminate the requirement that each conspirator must have the necessary criminal intent and must agree with the Defendant to conceal assets from the Internal Revenue Service in order to be guilty of the crime as charged.

Moreover, and most importantly, the Panel's Order and Judgment failed to treat the fact that the Government was bound by the testimony of its own witness under the precedent of *U.S.* v. *Vasquez, et al.,* Third Cir. 1963, 319 F.2d 381 by the virtue of the fact that the affirmative testimony of the alleged co-conspirator that she never intended to hide or conceal assets in concert with the Defendant from the

Internal Revenue Service or from anyone, clearly and uncontradictedly exhibits a complete absence of the required intent and agreement necessary to establish a conspiracy. At best the actions of Peggy McDaniel could only have incurred her liability as an aider and abettor. (see *Ianelli* v. *U.S.*, 420 U.S. 770)

The Panel's Order and Judgment herein, and misapplication of the law of conspiracy will result in a redefinition of the requirements of proof of conspiracy which is contrary to the requirements adhered to by all Circuits and the United States Supreme Court. Such a redefinition, if to be accomplished, should only be through judicial candor, by a treatment of all issues raised and presented. Anything less denies a Defendant his Constitutional Rights and a fair trial. To hold otherwise would be to disregard the requirements stated in *Bravarman* v. *United States*, that the nature and extent of a conspiracy must be determined by reference to the agreement between alleged co-conspirators which embraces and defines its object. (*Bravarman* v. *U.S.*, 317 U.S. 49) In the case at bar, it is clear and uncontradicted that the unimpeached testimony of the Government's witness and the only alleged co-conspirator, showed that no agreement existed to hide or conceal anything from the Internal Revenue Service or from anyone. Specifically, there was no proof of an agreement by the alleged co-conspirator to conceal assets from the I.R.S. in violation of the specific provision of the Internal Revenue Code applicable hereto.

Under the Indictment, this unimpeached, uncontradicted proof was fatal to the Government's case. The upholding of the obvious errors committed by the prosecution, and the trial court in this matter, constitutes a direct, distinct and unequivocal violation of the Defendant/Appellant's Constitutional Rights to due process and a fair trial.

It is respectfully submitted that the Panel's decision herein, should be reheard and that to effect uniformity of rulings and to accomplish a proper definitional holding of

these important issues that a hearing *en banc* should be ordered.

Respectfully submitted,

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APPENDIX C

JANUARY TERM — January 31, 1985

Before Honorable William J. Holloway, Jr., Honorable Oliver Seth, Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	No. 83-2089
THOMAS FRED WARD, Defendant-Appellant.	)	

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc, and motion for stay of issuance of mandate pending application to the Supreme Court of the United States for certiorari in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

It is further ordered that the motion for stay of mandate, pending certiorari, shall be granted for thirty days from the date of this order, and that if on or before that date there is filed with the Clerk of the Court of Appeals for the Tenth Circuit a notice from the Clerk of the Supreme Court of the United States that appellant has timely filed petition for writ of certiorari, the stay shall continue until final disposition by the Supreme Court.

HOWARD K. PHILLIPS, Clerk
By (s) *Robert L. Hoecker*, Chief Deputy Clerk